

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DENIS SHEILS	:	CIVIL ACTION
AND HARRIET SHEILS	:	
	:	
v.	:	
	:	
UNIVERSITY OF PENNSYLVANIA	:	NO. 97-5510
MEDICAL CENTER,	:	
JANET RENO, ATTORNEY	:	
GENERAL OF THE U.S.,	:	
AND THOMAS RIDGE, GOVERNOR	:	
OF THE COMMONWEALTH OF	:	
PENNSYLVANIA	:	

MEMORANDUM AND ORDER

Anita B. Brody, J.

March 1998

Plaintiffs Denis and Harriet Sheils, husband and wife, bring this action against defendants University of Pennsylvania Medical Center ("UPMC"), Attorney General Janet Reno and Governor Tom Ridge, seeking declaratory and injunctive relief from alleged infringements on their right to reproductive choice, specifically their right to participate in assisted reproductive technologies to help them to have a child -- both those technologies which are currently available and those which may become available in the future. All parties have moved to dismiss the complaint.

Plaintiffs allege that defendant UPMC imposes eligibility criteria for participation in its in vitro

fertilization ("IVF") program, and that these criteria screen out or tend to screen out people with disabilities, in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12182, the Rehabilitation Act, 29 U.S.C. §794 et seq., and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C.S.A. §955(i) and (l). Plaintiffs further allege that UPMC's policies regarding access to IVF services, and its denial of those services to plaintiffs for noncompliance, constitute negligence and negligent misrepresentation, breach of fiduciary duty, breach of contract, intentional infliction of emotional distress, and violation of international law against genocide.<sup>1</sup>

As to defendants Attorney General Reno and Governor Ridge ("the government defendants"), plaintiffs allege that several federal statutes, regulations and executive orders, along with one state criminal statute, restrict or prohibit embryo research generally and/or human cloning specifically, in violation of plaintiffs' constitutionally protected rights to make choices regarding the conception of a child. Plaintiffs seek to enjoin the enforcement of these statutes, regulations and executive orders so that they may have the option of availing themselves of human cloning technology to have a child.

#### I. The government defendants

The government defendants move to dismiss the complaint under F.R.Civ.P. 12(b)(1), for lack of subject matter

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<sup>1</sup> Plaintiffs do not seek money damages for any of their claims.

jurisdiction. Both the federal and state government defendants argue that there is no case or controversy sufficient to confer jurisdiction. I agree.

To satisfy the case or controversy requirement of Article III of the Constitution, an action must present a legal controversy that (1) is real and not hypothetical; (2) affects an individual in a concrete manner so as to provide the factual predicate for reasoned adjudication; and (3) sharpens the issues for the court's resolution. Armstrong World Industries, Inc. v. Adams, 961 F.2d 405, 410 (3d Cir. 1992), citing Los Angeles v. Lyons, 461 U.S. 95, 101-105 (1983). Although an action for declaratory judgment contemplates that relief may issue before an injury has occurred or before a statute has been enforced against a party, plaintiffs must still have suffered some threatened or actual injury from the alleged illegal conduct. Warth v. Seldin, 422 U.S. 490, 499 (1975).

In this case, plaintiffs allege that "any legislative or executive ban by the Government with respect to embryo splitting and research and/or human cloning for infertile couples attempting to have a baby is unconstitutional." (Complaint at ¶28). Plaintiffs seek a declaratory judgment that "any policy practice, order, regulation and law that bans embryo splitting and research and/or human cloning for infertile couples seeking to have a baby is unconstitutional and unlawful since it violates a couple's right to make reproductive choices free from Government interference and/or is unconstitutionally vague."

(Complaint at ¶78). Plaintiffs identify "(1) President Clinton's March, 1997 directive; (2) P.L. 104-91 and 104-208; (3) 42 U.S.C. §289g; (4) 45 C.F.R. 46.208; and 95) 18 Pa.C.S.A. 3216" as the specific acts against which they seek declaratory judgment. (Complaint at ¶79).

Only one of the alleged bans on embryo splitting and research and/or human cloning is a state statute, 18 Pa.C.S.A. §3216, and therefore relevant to the claims against Governor Ridge. Section 3216 prescribes criminal and civil penalties for nontherapeutic fetal experimentation and unauthorized use of fetal tissue. Plaintiffs have alleged no actual or threatened enforcement of this statute against them, nor have they alleged a relationship with a health care provider or researcher who is willing, at the present time, to provide services to them arguably prohibited by this statute. At best, plaintiffs allege an attenuated chain of events: if technology (i.e., embryo splitting and/or human cloning) were to become feasible, and if plaintiffs were to contract with a medical provider or researcher to receive these services, and if these services were prohibited by §3216, enforcement of §3216 against plaintiffs and/or the provider would violate their right to reproductive choice. Such allegations are too speculative and remote to create a claim or controversy sufficient to confer subject matter jurisdiction at this time.

The claims against Attorney General Janet Reno similarly fail for lack of direct harm. Notably, none of the

federal statutes, executive orders or regulations identified prohibit embryo splitting and/or human cloning, but only the use of federal funds to support such activity. Plaintiffs do not allege that they are recipients of federal funds, or that they have a relationship with a provider who is a recipient of federal funds, and who would provide these services to plaintiffs but for the funding ban.<sup>2</sup> As with the state defendant, plaintiffs' alleged harm is too speculative and remote to create subject matter jurisdiction over their claims against Attorney General Reno at this time.

## II. University of Pennsylvania Medical Center

Defendant UPMC has moved to dismiss the complaint for failure to state a claim. Plaintiffs' claims against UPMC arise out of the criteria UPMC imposes for their participation in its IVF program. Plaintiffs allege that by requiring blood (specifically HIV) tests, a psychological evaluation and genetic screening, UPMC is making impermissible determinations as to who may conceive a child.<sup>3</sup> Plaintiffs allege that UPMC's policies violate 42 U.S.C. §12182, specifically the prohibition against

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<sup>2</sup> Because plaintiffs have not alleged a case or controversy sufficient to create jurisdiction, I do not reach the issue of whether the federal ban on funding for embryo splitting and/or human cloning implicates any constitutionally protected rights.

<sup>3</sup> Plaintiff Denis Sheils refuses to consent to a mandatory HIV test (Complaint at ¶12), and plaintiff Harriet Sheils prefers not to have the test; both plaintiffs also object to UPMC's "policy and practice of a psychological evaluation and genetic screening being used as a basis to determine who is eligible to have a baby." Id.

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages or accommodations being offered;<sup>4</sup>

Although the complaint refers to infertility and perceived HIV infection as disabilities, plaintiffs do not allege that one or both of them have one or both of these disabilities. Even if I were to broadly construe the complaint to allege that both plaintiffs have one or both disabilities, plaintiffs do not allege that UMPC's eligibility criteria have screened one or both of them out, or will tend to screen one or both of them out because of one or both of these disabilities, with the result that they will not be able to fully and equally enjoy UPMC's IVF services.<sup>5</sup> In other words, plaintiffs have alleged that UMPC's eligibility criteria impermissibly screen out or tend to screen out persons with disabilities; to state a claim under the ADA, the Rehabilitation Act, the Pennsylvania Human Relations Act, or international law however, plaintiffs must allege that the criteria will screen out, or tend to screen out them. See, e.g.,

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<sup>4</sup> The analogous sections of the Rehabilitation Act and the PHRA similarly prohibit discrimination on the basis of disability in the provision of services.

<sup>5</sup> For the purposes of a motion to dismiss, I need not determine whether infertility and/or perceived HIV infection are disabilities within the meaning of the ADA, the Rehabilitation Act, PHRA, or under international law.

Wheeler v. Travelers Insurance Co., 22 F.3d 534, 538 (3d Cir. 1994) (litigant must assert his or her own legal interests rather than those of third parties); Lawrence v. National Westminster Bank of New Jersey, 98 F.3d 61,68 (3d Cir. 1996)(to state an ADA claim, plaintiff must be member of protected class). I will allow plaintiffs to amend their complaint to so allege if they can.<sup>6</sup>

**THEREFORE**, this                    day of March, 1998, upon consideration of Defendant Ridge's motion to dismiss the complaint (docket # 5), defendant Reno's motion to dismiss the complaint (docket #16), defendant UPMC's motion to dismiss the complaint (docket #11), and plaintiffs' responses, **IT IS ORDERED THAT:**

1. Defendant Ridge's motion to dismiss (docket #5) is **GRANTED**. Plaintiffs' claims against defendant Ridge are **DISMISSED WITH PREJUDICE**.

2. Defendant Reno's motion to dismiss (docket #16) is **GRANTED**. Plaintiffs' claims against defendant Reno are **DISMISSED WITH PREJUDICE**.

3. Defendant University of Pennsylvania Medical Center's motion to dismiss (docket #11) is **GRANTED**. Plaintiffs' claims against defendant UMPC are **DISMISSED WITHOUT PREJUDICE** to file an amended complaint, by April 20, 1998, in conformity with

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<sup>6</sup> If plaintiffs sufficiently re-allege some or all of their federal claims, I will retain supplemental jurisdiction over the state claims (counts IV, V, VI and VII), which adequately state claims for relief for the purposes of 12(b)(6).

this memorandum and order.

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ANITA B. BRODY, J.

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